JUN 8 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 45 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RUDOLPH STAND,
Counsel for Petitioner,
Office & Post Office Address,
80 Broad Street,
New York 4, N. Y.

JACOB SHIENTAG,
Attorney for Petitioner.

INDEX

	PAGE
Petition for Certiorari	1
Summary Statement of Matter Involved	1
Jurisdiction	4
Questions Presented	6
Statement of the Case	7
Reasons for Granting of Writ	16
Conclusion	25

Table of Cases Cited

Andres v. United States, 333 U. S. 740	16
Betts v. Brady, 316 U. S. 455	5
Buchalter v. New York, 319 U. S. 427	24
Chambers v. Florida, 309 U. S. 227	5, 25
Dist. of Columbia v. Armes, 107 U. S. 519	18
Frank v. Mangum, 237 U. S. 309	16
Hebert v. Louisiana, 272 U. S. 312	16
Hill v. Texas, 316 U. S. 400	16
Lisenba v. California, 314 U. S. 219	5
Lyons v. Oklahoma, 322 U. S. 596	5
Moore v. Dempsey, 261 U. S. 86	24
McNabb v. United States, 318 U. S. 332	16
Nudd v. Burrows, 91 U. S. 426	16
Ong Chang Wing v. United States, 218 U. S. 272	16

PAGE

Pennekamp v. Florida, 328 U. S. 331 23
People v. Buchalter, 289 N. Y. 181 24
People v. Odell, 230 N. Y. 481 16
People v. Ohanian, 245 N. Y. 227 18
People v. Robinson, 273 N. Y. 438 23
People v. Salemi, 306 N. Y. 863 2
People v. Zackowitz, 254 N. Y. 192 23

Rochin v. California, 342 U. S. 165 24
Rogers v. Alabama, 192 U. S. 226 6

Sheperd v. Florida, 341 U. S. 50 23
Smith v. Baldi, 344 U. S. 561 .....12, 19
Smith v. Texas, 311 U. S. 128, 130 5

OTHER AUTHORITIES CITED

United States Constitution:
Sixth Amendment 3, 14
Fourteenth Amendment 3, 4, 5, 6, 13, 14, 16, 24

United States Code:
Title 28, Sec. 2101 (c) 4
Title 28, Sec. 1257 (3) 4

Rules of the Supreme Court of the United States:
Rule 38 ..... 4, 5
Rule 38½ 4
Rule 12(1) 5

Frankfurter, The Case of Sacco and Vanzetti, p. 103. 18

Wharton, Crim. Ev. 11th Ed. Sec. 1171 16

Wigmore, Evidence, 3rd Ed. Sec. 497 17
Wigmore, Science of Judicial Proof, 3rd Ed. Sec. 250-4 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ..... Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Leonardo Salemi, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered March 12, 1954, affirming by a divided court of 4-to-3, a judgment of conviction and sentence of death imposed by the Court of General Sessions, New York County, upon a verdict convicting petitioner of the crime of Murder in the First Degree.

Summary Statement Of Matter Involved

The petitioner was convicted on November 20, 1952 of Murder in the First Degree, after trial before the Hon. Jonah J. Goldstein, and a special or so-called "blue

ribbon" jury in the Court of General Sessions, New York County (16; 1761) *

Before rendition of judgment on the jury's verdict, an application was made for a new trial upon the ground of newly discovered evidence and the deprivation of the defendant's fundamental constitutional rights (1798-1800; 1805-6; 1862-3). The record in the proceedings upon the application for a new trial is contained in Vol. I of the record on appeal (pages 600-724); Vol. II (pages 725-1376). The motion was denied with an opinion rendered by the trial judge (4111-4128).

The petitioner was sentenced to death on June 24, 1953 (4129-4131; 4188-4190). An appeal was taken from the judgment of conviction and from the order denying the motion to set aside the jury's verdict upon the ground of newly discovered evidence (4-6).

The New York State Court of Appeals affirmed the judgment of conviction, without opinion, by a *divided* Court of *four-to-three.* The case is reported in 306 N. Y. 863 as follows:

> "*People, &c., res.* v. *Salemi, ap.*—Judgment of conviction affirmed. No opinion. All concur except Lewis, Ch. J., Desmond, and Van Voorhis, J. J., who dissent and vote for reversal and a new trial on the ground that the Court's charge did not 'marshal the evidence' as required by *People, &c.,* v. *Odell* (230 N. Y. 481)."

Petitioner thereafter moved for reargument of the appeal by printed notice of motion and memorandum annexed, returnable April 5, 1954, which motion was denied, without opinion, on April 15, 1954.

In the event of the denial of the application for reargument of the appeal, petitioner moved for an order to recall

---

* References, unless otherwise indicated, are to the folios of the certified record on appeal submitted herewith.

and amend the remittitur, to set forth the following:

"Upon the appeal herein and upon the motion for reargument thereof there were presented questions under the Constitution of the United States:

(1) The Appellant contended that his rights were violated under the Sixth and Fourteenth Amendments to the United States Constitution by receiving in evidence against him the testimony of one Paul Janson who was allegedly an incompetent and insane person at the time he testified.

(2) That the defendant was deprived of due process of law under the Fourteenth Amendment of the Constitution of the United States in each of the following respects:

(a) The denial of his motion for a new trial on the ground of newly discovered evidence and for related relief;

(b) The receipt in evidence upon the motion for a new trial of the testimony of various witnesses who testified before the Grand Jury and also various newspaper articles which appeared in the public press concerning the death of a witness who had testified before the Grand Jury, and who had been allegedly murdered before the trial and all of which was related in said articles to the case then pending against the defendant;

(c) That the order of the Trial Court granting the District Attorney's motion for a special Jury to try the issues herein, over the objection of the defendant, was based upon insufficient papers and the Court's refusal to dismiss said Special Jury panel constituted a denial of due process and a violation of defendant's rights under the Fourteenth Amendment of the Constitution of the United States; that the application of Section 749-aa, Subd. 4 of the Judiciary Law of the State of New York under which said

order for a Special Jury Panel was made constituted a denial of due process and a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States.

(3) Upon the Appeal herein and upon Motion for Reargument thereof defendant contended that he did not receive a fair trial by reason of the failure of the Trial Court to marshal any of the evidence in the case in the charge to the Jury and that such failure constituted a denial of due process and a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States."

This motion was denied, without opinion, on April 15, 1954.

Petitioner then moved for reargument of the motion to recall and amend the remittitur as aforestated, which application was returnable April 22, 1954 and was thereafter denied, without opinion.

Certified copies of the documents above referred to are submitted herewith in support of this petition.

Mr. Justice Reed granted a stay of the execution of the petitioner, by order dated April 24, 1954, pending the filing and final disposition of the petition for writ of certiorari herein.

Jurisdiction

1. The judgment of the New York State Court of Appeals sought to be reviewed was entered March 12, 1954.

2. This petition was filed within ninety days after the entry of such judgment as required by law (28 U. S. C., § 2101(c); Supreme Court Rule 38½).

3. The jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3) and Rule 38 of the Rules of the Supreme Court of the United States.

4. The petitioner challenges the validity of the judgment of conviction and sentence of death on the constitutional ground of denial of due process of law in violation of the Fourteenth Amendment of the Federal Constitution. In compliance with Rules 12(1) and 38, we set forth later under the heading "Statement of the Case", the particulars relating to the raising of the substantial federal questions involved in the trial court; on the application and hearing for a new trial on the ground of newly discovered evidence; in appellant's main and reply briefs before the New York State Court of Appeals; on the printed motion for reargument of the appeal after affirmance of the judgment; on the motion to recall and amend the remittitur and on the motion for reargument of the motion to recall and amend the remittitur.

5. We believe that the cases later cited in this petition sustain the jurisdiction of this Court to grant the writ of certiorari in the exercise of the Court's discretion, notwithstanding the refusal of the New York State Court of Appeals to pass upon the Federal questions herein presented.

Upon review of a state court decision wherein a claim under the Federal Constitution was denied, this Court will examine and appraise for itself the evidence relating to such right. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights (*Smith* v. *Texas,* 311 U. S. 128, 130; *Chambers* v. *Florida,* 309 U. S. 227, 228-9).

The asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case (*Betts* v. *Brady,* 316 U. S. 455, 462). The Fourteenth Amendment protects against such conduct of criminal trials in state courts as amounts to a disregard of that fundamental fairness essential to the very concept of justice and as necessarily prevents a fair and impartial trial (*Lisenba* v. *California,* 314 U. S. 219, 236; *Lyons* v. *Oklahoma,* 322 U. S. 596, 605).

This Court has the power to examine into the raising of the federal question and if the highest state court's refusal to deal with that question is erroneous, the Supreme Court's jurisdiction can be asserted (*Rogers* v. *Alabama*, 192 U. S. 226, 230-1).

Questions Presented

I. Whether the right of a defendant to be accorded due process of law under the provisions of the Fourteenth Amendment to the Constitution of the United States has been invaded and violated, when the trial court received in evidence against defendant, the testimony of one Paul Janson, an incompetent and insane person, which fact was known to the prosecutor, but undisclosed to the defense and not divulged to the jury.

II. Whether the defendant was deprived of due process of law under the Fourteenth Amendment of the Constitution of the United States in each of the following respects:

(a) the denial of his motion for a new trial on the ground of Janson's mental condition discovered after the jury's verdict, especially since he was the only identifying witness in the case;

(b) The receipt in evidence upon the hearing for a new trial of the testimony of various witnesses who testified before the Grand Jury, but who were not produced as witnesses at the trial and who were never cross-examined;

(c) the receipt in evidence of various inflammatory newspaper articles concerning the alleged murder before the trial of a Grand Jury Witness and all of which was related in said articles to the defendant and the case pending against him.

III. Whether the defendant was denied due process of law in violation of his rights under the Fourteenth Amend-

ment to the Constitution of the United States by the trial court's total failure to marshal any of the evidence in the case and in charging only general legal abstractions.

Statement of the Case

In order to obtain a clear view of the facts material to the questions presented here, a brief outline of the case becomes necessary. Two sets of proceedings in the record on appeal must be differentiated,—(1) the trial; and (2) the motion and hearing for a new trial, which took place before the court imposed the death sentence on the petitioner.

The Trial

About 8:30 o'clock in the evening of February 26, 1952, one Walter Forlenzo was shot and killed in a bar and grill in New York City (176-7). Many people were in the place at the time of the shooting (200-1; 219). A man, with gun in hand, was seen standing at deceased's table as he slumped from his chair to the floor. The man with the gun left without interference and the place was rapidly emptied of its occupants (307-318).

Only two of the many persons who were in the place, were called as witnesses. Andrew Bertorelli, one of the owners of the bar and grill, testified that he saw the defendant at the bar that evening some time prior to the shooting but not thereafter. Bertorelli was in the kitchen, to the rear of the dining room, when he heard shots and did not witness the occurrence (174-202).

A customer, Paul Janson, about whom a substantial part of this case and the motion for a new trial is concerned, testified that he was drinking at the bar and watching a television program when he heard two shots fired* (304-5).

---

* After Janson's commitment to Pilgrim State Hospital as an insane person, he told the doctors that 75 people were present in the bar and grill the night of the shooting (3077). Upon the hearing for a new trial he swelled that number to 125 people (3063-6).

Upon the trial he identified the defendant as the man he saw standing at the table with gun in hand while the deceased slumped to the floor (305-7; 312-3). He claimed he saw the defendant's face for about two seconds and testified that he had seen the defendant in the bar on two or three previous occasions, the last being about a year and a half prior, but had never spoken to him (368; 382-4).

The day following the shooting, Janson was interviewed by the police and the District Attorney's Office but steadfastly denied knowing anything at all about the matter (376-382). He persisted undeviatingly in this denial for several months although questioned at various times by the police and members of the District Attorney's staff (626-632).

On July 2, 1952, Janson was committed as a material witness to the City Prison (626). Up to that time and for several weeks thereafter, he still denied knowing anything about the shooting (633-638). He was not a witness before the Grand Jury which found the indictment against the defendant (399).

At various times, the authorities showed Janson pictures, which included photographs of the defendant. He picked out the defendant's picture but his identification was merely that of a man whom he claimed to have seen in the bar and grill on previous occasions. Up to July 23rd, Janson resolutely insisted, however, that he had not seen the defendant on the night of the shooting (446-452; 503-8; 545-6).

On November 11, 1952—the day before the trial commenced—Janson ran headlong into some iron bars up at the prison where he was held as a material witness (326). Eight stitches were taken in his scalp to sew the lacerations of his self-inflicted injuries (624). That this was an attempted suicide was known to the prosecutor, but not disclosed to the defense and not divulged to the jury. Janson was brought to the District Attorney's office the following day, November 12th, when the trial began and was kept there all day without medical attention. That

night he was taken to a hotel under police surveillance and not returned to the city prison as required by the order of commitment (2225-8; 2240-6).

The following afternoon, November 13th, Janson gave his testimony which was not completed that day. He then identified the defendant as the man with the gun, although Janson was never asked to pick out the suspect in a "line-up" with other persons (474-5). At the close of the court session, the trial judge directed that he be placed in the custody of police (395) and as was later discovered he was maintained incommunicado at a hotel under twenty-four hour round-the-clock police observation during the week that the case was on trial.

As was also later discovered, during that week, Janson stopped eating, smoking and talking, kept to himself and just stared at the walls of his room and was not submitted for examination to any physician (2232-2241). He was "very morose and melancholy" (2286). These facts were known only to the police and the prosecutor (2243).

*Janson was the only alleged eye-witness to the homicide.** Thus, the main issue in the case turned upon the reliability of Janson's testimony of personal identification of the accused. There were no confessions or admissions in evidence.

No motive whatever was shown for the killing. There was no evidence of any previous threats or ill-will between the deceased and the defendant. The defendant voluntarily surrendered himself in the District Attorney's Office

---

* On the application for a new trial, defense counsel sought to establish that Janson was incapable of giving a trustworthy account of the matters allegedly witnessed by him because of his deranged mental condition at the time of the trial (3972-3996). Janson's statement to the prosecutor on July 23, 1952—in which he declared that he wanted to tell "the whole truth" (Deft.'s Ex. F, p. 1425) was in direct contradiction with the testimony he gave on the trial, which fact was conceded by the District Attorney (4091-2).

on May 14, 1952 (934; 945). The police officer in charge of the case testified that he did not know whether or not the defendant at any time knew that the police were looking for him (944).

The defense was an alibi (1008-1233).

On the night of November 20th, the jury returned a verdict of guilty of Murder in the First Degree (1761). The Court fixed December 12, 1952 as the date of sentence of the defendant (1772).

The Motion for a New Trial

The morning after the jury's verdict—November 21, 1952—marked the beginning of a series of most unusual events, revealing the danger of convicting the innocent which has been so often shown to lurk in the sort of identification testimony upon which the prosecution here relied.

On that day, the witness Janson was brought to the District Attorney's Office and then for the first time was examined by the prosecutor's medical assistant (1936-1941). Janson was found to be completely insane, suffering from delusions and hallucinations, was markedly depressed and had suicidal tendencies, and was immediately sent to the Psychiatric Division of Bellevue Hospital (1936-1941). He was then in such a deranged mental condition that, according to the prosecutor's own psychiatrist, it would have been improper to call him as a witness for any purpose (3534-6).

On Janson's admission to Bellevue Hospital, the admission notes revealed the following:

"HISTORY: 11/21/52 (why here)

I was a witness on a trial—a man was in a shooting in the Belvedere Bar and Grill—I saw the fellow

run out—I saw his face—I was standing at the end of the bar—*It's up to me to convict him but I can't be sure of the victim—I mean of the man who done the shooting*" (1943) (Emphasis supplied).

At Bellevue Hospital, Janson again continued to exhibit delusional and hallucinatory ideas. Four days later he again attempted suicide by cracking open his skull and was so disturbed that he had to be transferred to another ward (1944-1947). He was "guilt-ridden because of testimony he gave in court * * * insight lacking. Judgment impaired" (1948). He was suffering from an "involutional psychosis" and given an emergency electric shock treatment (1949).

On December 2, 1952, an order was made by the Supreme Court, Bronx County, upon the certificate of two doctors, committing Janson as an insane person to Pilgrim State Hospital. He was then diagnosed as suffering from schizophrenia (2062-3).

At Pilgrim State Hospital for the Insane, the admission note on December 4, 1952 relating to Janson indicated the following:

"* * * He gave the following explanation of why he was sent to Bellevue for observation. *'I happened to be a witness in a shooting affair in a cafe. I didn't see the shooting but turned around right after the shooting was over. I got a glimpse of the man's face that did the shooting. When the case came up in September, I identified the man in court. Afterwards, I wasn't sure so that way I rammed my head into the iron bars in the place where I was staying at the Bronx Jail. After I hit my head, they were still waiting for me to identify him again to make sure. They tried to calm me down, the D. A. I slept at a hotel. I never got back to the trial. I was dropped at Belle-*

*vue for a check-up. * * * I always imagine somebody is whispering. I always have a suspicion that they despise me. They look and talk at me.' * * *"* (1986-1988)—(Emphasis supplied).*

Before the defendant was arraigned for sentence and sometime in January 1953, information was acquired by defense counsel concerning the commitment of Janson to Bellevue Hospital for observation the day after the jury's verdict, and his later commitment as an insane person to Pilgrim State Hospital (2881-3).

The hospital records, however, were first made available to the defense in February, 1953 (2883) and from other investigations resulting therefrom, startling facts emerged relative to Janson's mental condition—all clearly indicating that Janson's kind of mental illness did "not set in overnight but [was] the culmination of a long process".** (2155-2181).

Based upon the discovery of the foregoing facts which we have presented in broadest outline, an application was made for a new trial upon the ground of newly discovered evidence and the deprivation of the defendant's constitutional rights. The moving papers are incorporated in the record on appeal (pp. 600-673). No counter affidavits were filed in behalf of the prosecution. Hearings thereon were held before the trial court beginning May 19, 1953 (Vol. I, pp. 674-724; Vol. II, pp. 725-1370).

---

* Janson attempted suicide on Nov. 11 (326). The trial began Nov. 12 (32). Janson testified on Nov. 13-14 (250; 280; 397). The record, including the hearing on the motion for a new trial, abounds with instances too extensive for complete presentation upon this application which demonstrate the untrustworthiness of this insane witness.

** See opinion of Mr. Justice Frankfurter in *Smith* v. *Baldi*, 344 U. S. 561, at page 572. Later reference will be made to this case.

Raising of Federal Questions In the Trial and Appellate Court

(1) In the affidavit supporting defendant's motion for a new trial upon the ground of newly discovered evidence presented to the trial court, defendant raised the federal question of deprivation of his fundamental rights because the insane witness Janson was permitted to testify against him (Record on Appeal, pp. 602, 621). At page 621, defendant contended:

> "There resides in this Court the inherent power to rectify a wrong and prevent a miscarriage of justice. Judgment has not yet been pronounced. It is apparent that by reason of the circumstances now disclosed the fundamental rights of the defendant under the Federal and State Constitutions and the provisions of the Code of Criminal Procedure guaranteeing the absolute right to be confronted by witnesses were violated."

Upon three separate occasions before the Appellate Court, defendant contended with respect to the testimony given by the insane witness Janson, that defendant was deprived of due process of law within the intendment of the Fourteenth Amendment to the United States Constitution:

(a) Printed motion for reargument and memorandum annexed thereto (p. 9);

(b) Motion to recall and amend the remittitur, dated March 25, 1954 (pp. 1-2);

(c) Motion for reargument of motion to amend the remittitur dated April 20, 1954, affidavit of Jacob Shientag (pp. 3-4).

(2) During the proceedings upon the application for a new trial, the trial court received in evidence all of the testimony that had been given by witnesses called before the Grand Jury, in spite of the vigorous protest and objection of defense counsel that such ruling was highly prejudicial and essentially unfair (R. pp. 981-987; Balance of Grand Jury Testimony, reproduced in Record at p. 1413).

This ruling—lacking every element of fundamental fairness—resulted in bringing into the proceedings evidence of witnesses who had not testified at the trial; who did not confront the defendant upon the trial and who were not subject to cross-examination and were never cross-examined. No preliminary hearing was ever held before a magistrate. This ruling was a flagrant violation of petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution.

Upon the motion for reargument of the appeal in the Appellate Court, defendant urged this federal question (Printed Motion for reargument and memorandum annexed p. 10; Motion to recall and amend remittitur, pp. 1-2; Motion for reargument of motion to amend remittitur, affidavit of Jacob Shientag, p. 4).

(3) The trial court also received in evidence, despite objection and exception, upon the hearing for a new trial, and in further violation of every concept of due process of law most damaging and prejudicial newspaper articles referring to the alleged killing of one Basilio Paiutta, a Grand Jury witness on July 2, 1952 and also concerning defendant and his past life and related the death of this man who was an alleged witness to the homicide, to the defendant and the case then pending against defendant. (Record on Appeal, pp. 889-890).

The defendant had voluntarily surrendered on May 14, 1952 and was in custody at the time (R. pp. 298, 312, 315).

These excerpts from the newspapers are reproduced in the Record on pages 1407, 1409 and 1411.

Pursuant to the command of statute, the defendant was asked on the day of sentence whether he had any legal cause to show why judgment of death should not be pronounced against him (R. p. 1381). In his lengthy statement (pp. 1382-1396), among other things, defendant protested his innocence in an impassioned plea and bitterly complained that he did not receive the fair trial to which by law and justice he was entitled (R. p. 1393).

Defendant, in the course of his plea, declared:

> "And for the benefit of the Justices of the High Courts, I say with extreme care, your Honors, the part this Court has played in this farce referred to as my trial, and see if it wasn't the killing of Basilio Paiutta that I was tried for, along with the killing of Walter Forlenza, which held little or no water at all" (p. 1393).

Defendant concluded as follows:

> "* * * I nevertheless feel confident that in the final analysis, the High Court will take a hand in correcting this unexpected verdict, in which the weight of the evidence is definitely contrary to the verdict returned. That is what the High Courts are for, to see that the elementary concepts that stand ingrained in our legal framework are carried out to the very letter of our laws and stand to be used whenever life or liberty is in peril * * *" (R. p. 1395).

On this question, defendant contended before the Appellate Court that such patently incompetent and inflammatory evidence prevented the trial court from making any proper determination of the Motion for a new trial (Printed Motion for reargument of appeal and memoran-

dum, pp. 10-12; motion to recall and amend remittitur, pp. 1-2; motion for reargument of motion to amend remittitur, affidavit of Jacob Shientag, pp. 4-5).

(4) In the main brief submitted to the Appellate Court, defendant contended (pp. 64-68), among other things, that he had been deprived of a fair trial because of the total inadequacy of the charge, citing among other cases, *People* v. *Odell,* 230 N. Y. 481; *Nudd* v. *Burrows,* 91 U. S. 426, 439. In the brief on reargument of the appeal (pp. 4-6), defendant contended that his constitutional right to a fair trial guaranteed under the Fourteenth Amendment of the Federal Constitution had been violated by the total inadequacy of the Court's charge to the jury. The following cases, among others, were cited: *Andres* v. *United States,* 333 U. S. 740, 765; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279 and *Hill* v. *Texas,* 316 U. S. 400, 406.

Reasons for Granting the Writ

The special and unusual circumstances of the record show a manifest violation of petitioner's rights to a fair, impartial and deliberate trial guaranteed under the Due Process Clause of the Fourteenth Amendment.

In determining whether one convicted of crime has been denied due process of law, the entire course of proceedings, and not merely a single step, must be considered (*Frank* v. *Mangum,* 237 U. S. 309, 331, 332). It is sufficient reason for granting the writ that the case presents serious questions in the administration of criminal justice (*McNabb* v. *United States,* 318 U. S. 332, 339, 340; *Hebert* v. *Louisiana,* 272 U. S. 312, 316).

The Insane Witness, Paul Janson

The fundamental value of all testimony is its trustworthiness (Wharton, *Crim, Ev.,* 11th Ed. § 1171). Evidence of identification of accused persons—especially in a

capital case—ought to be certain and reliable for "some of the most tragic miscarriages of justice have been due to testimonial errors in this field" (*Wigmore, Science of Judicial Proof,* 3rd Ed., § 250-254).

As already stated, petitioner moved for a new trial as soon as he discovered the facts relating to Janson's insanity. Was Janson's testimony at the trial and at the hearing for a new trial, the fabric of a disordered and deranged mind?

In the trial court's opinion denying petitioner's motion for a new trial it is stated, among other things, after briefly referring to the testimony of the psychiatrists called by the defense and the People (R. 1374-1375):

> "The issue of the competency of a witness is for the Court—it is not to be decided by experts. The opinions of experts are only for the Court's guidance.
>
> Even though a witness is insane after inquiry by the Court, he may be competent to testify. • • •
>
> From my observation of Janson, both at the trial and at the hearing on this motion, and considering all the testimony at the hearing, I find as a fact that on both occasions he was competent to testify. His testimony at this hearing was substantially the same as that which he gave at the trial".

It is true that under the division of function between judge and jury, the question of competency of a witness is a preliminary question for the court, but, as stated in Wigmore, *Evidence,* 3rd Ed. § 497, pages 590-1:

> "• • • after the Court has passed on the witness' capacity, it is still open to the jury to conclude that the witness is not credible and to reject the testimony entirely; and the Court's decision does not necessarily affect the estimate which the jury must make".

Credibility of the witness is distinct from admissibility. It was for the jury—and the jury alone—to decide what amount of credit shall be given to the testimony of a lunatic or insane person (*District of Columbia* v. *Armes*, 107 U. S. 519, 523). Such issue was never submitted to a jury in the case at bar.

Indeed, in this case, no inquiry was conducted by the court as to Janson's competency to testify at the time of the trial and the jury was kept wholly in the dark as to Janson's true mental condition which, if disclosed, might well have changed the result and have meant the difference between acquittal and death for the defendant. The newly discovered evidence bore directly on Janson's aberration upon the specific subject of his alleged identification of the defendant.

The criterion that should have been applied here was not what a judge might think about Janson's testimony, but what a jury might think about it, if permitted, under proper instructions, to appraise Janson's testimony, attacked on the ground of his insanity, at the time of the event to which he testified, as well as at the time his testimony was given.

Petitioner at pages 65-6 of his main brief before the Appellate Court pointed out that there was not a single reference to Janson or his testimony in the trial court's charge.

The conclusion on this record is inescapable that the Judge made himself the trier of the facts and acted as a self-appointed substitute for the jury* (*People* v. *Ohanian*, 245 N. Y. 227, 233).

---

* See Frankfurter (now Mr. Justice Frankfurter), *The Case of Sacco and Vanzetti*, at page 103: "* * * Do the new facts raise debatable issues? Could another jury, conscious of its oath and conscientiously obedient to it, reach a verdict contrary to the one that was reached on a record wholly different from the present, in view of evidence recently discovered and not adducible by the defense at the time of the original trial?"

In *Smith* v. *Baldi*, 344 U. S. 561, Mr. Justice Frankfurter, whom Mr. Justice Black and Mr. Justice Douglas join, declared in a dissenting opinion (pp. 572-3):

> "But I am of the view that there is another reason, which in itself is for me conclusive, why this Court should not affirm the judgment below. It is that a new decisive factor, which was introduced for the first time here, requires reconsideration of the disposition below. After the case left the Court of Appeals it came to the knowledge of petitioner's counsel that the court-appointed expert, the professional witness on the issue of insanity on whose testimony the Pennsylvania courts relied, had himself been committed, as of January 12, 1952, because of an incurable mental disease which had deprived him of 'any judgment or insight'. This fact was brought to the notice of this Court in an affidavit not challenged by the respondent, which also averred that 'this intellectual deterioration was evidenced even on a clinical level in January, 1951'. The expert's report on Smith's sanity was made to the sentencing court on November 5, 1948. His disability was not known either to the District Court or the Court of Appeals in February and October, 1951, when they respectively ruled against the petitioner. Even uninformed judges may know that this kind of mental illness does not set in overnight but is the culmination of a long process. Indeed, the medical history, sketchy as it is, revealed by the affidavit filed here demonstrates the gradual manner in which the mental illness in question developed. The extent to which this affidavit vitiates the worth of the expert testimony taken by the sentencing court should not be made a matter of judicial notice. But to allow the victim of this testimony, which, in any event, has been brought into doubt, to go to his death without an opportunity for reassessment,

> by either State or federal court, of the basis for the rejection of his plea of insanity would constitute a denial of due process no less gross than if the sentence had been imposed without any hearing at all on the issue of sanity."

We would not touch further upon the subject, deeming it fully covered by the record and our main brief before the Appellate Court, if it were not for the constantly repeated assertion in the respondent's brief in the Court below that fear was the underlying basis for Janson's lies and the cause of his mental upheaval. The fact is that immediately after the suicide attempt on November 11th Janson told the Guard Captain and Warden at the City Prison that the reason he wanted to destroy himself was that he was depressed and worrying about his sick wife, was tired of living and wanted to end it (2018, 2013). Janson had been in difficulty with the courts years ago when he committed perjury. When he was admitted to Bellevue he said that he *"was not sure of the man who did the shooting"* and if he went to Court and said "it was the man I'll be in trouble again" (1943).

On admission to Pilgrim State Hospital *he said he did not see the shooting but identified the man in Court and then was not sure and that was the reason he attempted suicide* (1986). The findings of the Pilgrim State Hospital indicate that Janson had "more than tasted the flavor of alcohol (1992); that he had a paranoid predisposition and "the triad of alcohol, homosexual preoccupation and paranoid ideation were definitely present" (1993).

The fear that Janson claims he experienced was in no way chargeable to the defendant or any one connected with him. Whether the reason advanced by Janson for his lies and his attempts at suicide were honest or feigned it is difficult to say. For weeks prior to the attempted suicide on November 11th, Janson was psychotic. His

testimony upon the new trial hearing indicates this beyond question. During those weeks he was suffering from delusions, hallucinations and was awaiting an opportunity to destroy himself (3251-54; 3099-3108).

Who can understand the functioning of a disordered mind? Who can tell what motivates such a person in conduct and speech? Whatever the basic cause of the mental condition the fact of incompetency remains. This cannot be obscured by the emphasis placed by respondent upon its cause.

The mere statement of the claim that Janson was insane prior to November 11th, regained his sanity while a witness, and then became indisputably insane again almost immediately thereafter is its own refutation.

The facts known to the District Attorney the day before Janson took the witness stand dictated that a preliminary inquiry be conducted, perhaps in the absence of the jury, to determine Janson's competency. The Court apparently doubted Janson's competency when upon the trial he asked the witness whether he had ever been in a mental hospital or treated by a psychiatrist (482-484).

Again the fact is that defense counsel was not advised of the situation, no preliminary hearing upon the question of competency was held, and most important of all, no inkling was given to the jury of Janson's mental state so that his testimony might be evaluated in the light thereof. Both the District Attorney and the Trial Court seem to have lost sight of these vital considerations.

The Grand Jury Testimony After Conclusion of the Trial

Due process of law is coextensive with the entire trial from its beginning to its end. After the verdict was rendered, the trial court read to the jury, testimony given

to the Grand Jury by a witness (Basilio Paiutta) who had died before the trial (R. pp. 589-591). This was done apparently to ease the minds of the jurors as to whether they had "rendered a correct verdict" (R. p. 589). The jury had deliberated from 11:35 A.M. to 7:55 P.M. (R. pp. 578, 587). The trial court denied defendant's request that this Grand Jury testimony be excluded from the record (R. pp. 592-3). Upon the hearing for a new trial, a similar application to expunge this prejudicial, extraneous and improper matter was made and denied (R. pp. 984-987). Petitioner on the printed motion for reargument of the appeal contended that the trial court's ruling thereon was erroneous and violated petitioner's right to a fair trial (Memorandum supporting printed Motion, p. 9).

The Admission in Evidence of the Entire Grand Jury Minutes Upon the Motion for a New Trial

We have already referred to this phase of the case at page 14 of this petition and we do not think any further discussion of this point is necessary. Due process of law is certainly not observed if such unfair procedure is resorted to, for it stripped the accused of the presumption of innocence and precluded a proper determination of the motion for a new trial.

The Admission in Evidence of Inflammatory Newspaper Reports Upon the Motion for a New Trial

The trial court received in evidence, despite objection (R. p. 890) newspaper articles referring to the alleged killing of Basilio Paiutta, a Grand Jury witness on July 2, 1952 to which we have referred at page 14 of this petition. In sensational headlines and in the text of the newspaper reports it was set forth "WITNESS IN SLAYING FOUND RIDE VICTIM—DEATH LINKED TO TESTIMONY" (R. p. 1407,

N. Y. Evening Journal; "FIND KEY MURDER WITNESS GARROTED" (This clipping bore the petitioner's photograph and stated under his name: "Has Long Record—Chief Witness against him Killed" (R. p. 1409, Daily Mirror; and "KEY WITNESS IN GANG SLAYING STRANGLED, BODY LEFT IN STREET" (This clipping also contained petitioner's photograph, with the legend underneath his name: "Key witness against him slain" (R. p. 1411, Daily News).

There was not the slightest intimation of any kind during the course of any of the proceedings in the Courts below that the petitioner was in any way involved or implicated in the death of this Grand Jury witness, nor was there any evidence from which the inference could be drawn that such death had any relationship whatever to the petitioner's case. These newspaper reports should never have been received in evidence by the trial court and made part of the Record on Appeal. Fundamental principles of fair play were thereby violated and "fatally infected" the entire proceedings.

It is asking too much of any human being, regardless of his station in life, to obliterate such matters from one's mind. We cannot see how any impartial, unbiased judicial determination could have been made under those circumstances (See *Pennekamp* v. *Florida,* 328 U. S. 331, 357-366; *People* v. *Robinson,* 273 N. Y. 438, 446; *People* v. *Zackowitz,* 254 N. Y. 192, 198).

The inclusion of *ex parte* Grand Jury testimony and inflammatory and highly prejudicial newspaper reports into the record, upon the trial court's insistence, denied the petitioner every vestige of due process of law and the right to the court's dispassionate, unbiased judgment. (*Sheperd* v. *Florida,* 341 U. S. 50-55, per Jackson, J.)

In these circumstances, the petitioner did not have a fair chance to defend his life. The trial and the hearing on the application for a new trial were a mere sham and pre-

tense (*Moore* v. *Dempsey,* 261 U. S. 86, 91). Proceedings conducted in such manner by the trial judge were contrary to the basic principles repeatedly enunciated by this Court in many and diverse cases involving the violation of the Due Process clause of the Fourteenth Amendment (*Rochin* v. *California,* 342 U. S. 165).

The Trial Court's Charge

The contention that petitioner was deprived of his fundamental rights to a fair trial because of the total inadequacy and invalidity of the Court's charge is stated at page 16 of this petition, and will not be repeated here. We desire, however, respectfully to call this Court's attention to the declaration of Chief Judge Lehman, in *People* v. *Buchalter,* 289 N. Y. 181, 223:

> "The accused is entitled to demand that the issues of fact be submitted to the jury in a charge which correctly defines the questions upon which the jury is the arbiter and the rules of law which bind the jury and which is calculated to assist the jury in its deliberations. These are fundamental rights guaranteed by the Constitution and part of the freedom which this country is now desperately fighting to maintain. To the extent that the trial court errs either in its rulings or in its charge or fails to safeguard the rights of the accused to a fair trial or intrudes upon the field reserved to the jury and withdraws from the jury questions upon which the jury is the sole arbiter, the verdict of the jury is tainted and is not a conclusive finding of guilt".

In the *Buchalter* case, *supra,* this Court "granted certiorari in order that the petitioners' claims of denial of a federal right might be examined in the light of the record with the aid of briefs and oral argument" (*Buchalter* v. *New York,* 319 U. S. 427, 429).

Conclusion

At the time that petitioner voluntarily surrendered himself to answer the charge in the indictment (945)—and at no time thereafter—did the petitioner surrender the right to a fair trial protected by the Due Process Clause of the Fourteenth Amendment. We earnestly submit that it is plain from the record that petitioner's fundamental rights have been seriously violated here.

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." (*Chambers* v. *Florida*, 309 U. S. 227, 241.)

For these reasons, it is respectfully submitted that a writ of certiorari should be granted.

Dated: New York, June 7, 1954.

RUDOLPH STAND,
Counsel for Petitioner.

JACOB SHIENTAG,
Attorney for Petitioner.